United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7387

To Be Argued By
CARL A. SCHWARZ, JR.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MILLAR ELEVATOR INDUSTRIES, INC.,

Plaintiff-Appellant,

—against—

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, THOMAS VAN ARSDALE, ndividually and as Business Manager of Local 3, JAMES O'HARA, individually as Asst. Manager of Local 3, JOHN KROMER, individually and as Business Representative of Local 3, "JOHN DOE", "JAMES SMITH", and "JANE ROE",

Defendants-Appellees,

and

LOCAL UNION NO. 1, INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Intervenor-Appelle

BRIEF OF PLAINTIFF-APPELLANT

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- against -	
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Defendants-Appellees.	
- and -	
LOCAL UNION NO. 1, INTERNATIONAL UNION OF ELEVATOR CONTRACTORS,	
Intervenor.	

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT PURSUANT TO RULE 28

This is an appeal from an order rendered by Judge Jack B. Weinstein of the United States District court for the Eastern District of New York on August 12, 1976 denying plaintiff's motion for a preliminary injunction and dismissing plaintiff's action for a permanent injunction. Judge Weinstein's order was endorsed by him on the Order to Show Cause issued by Judge

George C. Pratt, of the same Court on August 10, 1976.

ISSUES PRESENTED

Millar* submits the following statement of issue and of the case.

1. Did the District Court's err in refusing to grant Millar's motion for a temporary restraining order and in dismissing Millar's action for a permanent injunction of a work stoppage in violation of the no-strike provisions of its Collective Bargaining Agreement with Local 3** on the ground that the dispute was not sufficiently arguably arbitrable to warrant an injunction since the Court construed the arbitration agreement between Millar and Local 3 to apply exclusively to employee initiated grievances?

2. Is Local 3 excused from honoring its no-strike commitment and agreement to arbitrate disputes as to the application and interpretation of its agreement with Millar as a result of an award by an Association of Employers and Unions to which Millar was excluded?

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* Reference to Millar is to Plaintiff-Appellant.

** Reference to Local 3 is to Defendants-Appellees.

*** Reference to Local 1 is to Intervenor-Appellee.

STATEMENT OF THE CASE

I. THE PROCEEDINGS BELOW

This is an action arising under the Labor Management Relations Act §301, 29 U.S.C. §185. Millar sought a temporary restraining order, preliminary injunction and permanent injunction of a work stoppage, in violation of the no-strike provisions of its Collective Bargaining Agreement with Local 3 on the ground that the grievance which gave rise to the work stoppage was subject to arbitration under the terms of said Collective Bargaining Agreement.

Millar on August 5, 1976, commenced this action by the filing of a Verified Complaint with the Clerk of the United States District Court for the Eastern District of New York. On the same day, George C. Pratt, District Judge, issued an Order to Show Cause with a temporary restraining order restraining Appellees from continuing the work stoppage in question and requiring said Appellees to appear before Jack B. Weinstein, a Judge of that Court on August 13, 1976. This order was consented to by counsel representing the Appellees and counsel so endorsed his consent on Judge Pratt's order.

Thereafter, on August 10, 1976, Appellant was compelled to request an Order to Show Cause as to why Appellees should not be punished for contempt for violating and disobeying the order of the Court issued on August 5, 1976,

described above. Said order was issued by Judge Pratt on August 10, 1976 and made returnable before Judge Weinstein on August 12, 1976, along with the prior order. At Judge Weinstein's request, the Court on its own motion, changed the return date on both motions before Judge Weinstein to August 11, 1976.

On August 11, 1976, Millar and Local 3 appeared before Judge Weinstein at or about 10 A.M. and Local 3 agreed to obey the order of the Court issue on August 5, 1976. At the same time, the attorneys for Local 1 presented a motion to intervene on the ground that they had an interest in the proceeding. Millar objected on the ground that Local 1 was not a party to its contract with Local 3 nor did Millar have any employees represented by Local 1, or have a duty to bargain with Local 1. Judge Weinstein allowed the intervention. However, he issued no order or stated no reason for so doing.

Judge Weinstein then ordered the parties to appear before him again at 3 P.M. on the same day. At 3 P.M. after it was ascertained that Appellees were obeying the Court's order, Appellant withdrew its request for an order to punish the Defendants for contempt. Judge Weinstein then set the matter down to be heard on August 12, 1976 at 2 P.M.

On August 12, Judge Weinstein conducted an evidentiary hearing on Appellant's motion for preliminary injunction and issued the following order appealed from:

> "Upon full trial of the issues the case is dismissed. The Court finds that the dispute is not sufficiently arguably arbitrable to warrant an injunction. The temporary restraining order is extended to the first motion day of the Court of Appeals, Second Circuit, so that the parties may seek a stay or other relief. The clerk will close the case.
>
> SO ORDERED,
>
> s/Jack B. Weinstein
> August 12, 1976"

II. STATEMENT OF FACTS

THE COLLECTIVE AGREEMENT BETWEEN THE PARTIES

Millar is engaged in the business of repairing, reconstructing, upgrading, maintaining, modernizing, installing and converting elevators to automatic operation. (Tr. 4)****

Millar recognizes Local Union No. 3, International Brotherhood of Electrical Workers ("Local 3") as the bargaining agent for the employees performing this work and has done so since the 1940's. (Tr. 4)

**** Tr.__, refers to pages in the transcript of the hearing before Judge Weinstein on August 12, 1976.

Local 3 and Millar are parties to a Collective Bargaining Agreement effective from January 7, 1976 through October 29, 1978 (hereinafter referred to as "the Agreement") which governs the wages, hours and other working conditions for Millar's employees represented by Local 3. (Tr. 4) [A copy of the Agreement was admitted into evidence as Exhibit 1. (Tr. 5)] This Agreement was in effect on August 5, 1976. (Tr. 5)

NO STRIKE PROVISIONS

Article XV of the Agreement provides as follows: (Exhibit 1, Page 28)

> ...(b) That there shall be no strike of any kind, including slowdowns, sit-down, stay-in, walk-out, boycott, picketing or work stoppage during the term of this Agreement. Any violation (1) on the part of the Union officials shall constitute a breach of this Agreement or (2) on the part of any employee, whether or not an official of the Union, shall constitute just cause for disciplinary action, which may include discharge.
>
> Each Company pledges that there shall be no lockout during the term of this Agreement."

GRIEVANCE PROVISIONS

Article XI of the Agreement reads as follows: (Exhibit 1, page 20)

"Grievance Procedure

Nothing in this section shall preclude the right of any individual employee to take up his grievance direct with his immediate supervisor, his department head, or the President, if he so chooses. However, when an employee has a difference or dispute as to the interpretation or application of any provision of this Agreement, there shall be no suspension of work on account of such difference, but an earnest effort shall be made to settle the question immediately by means of the procedure herein described, and no other method of adjustment will be resorted to. (Emphasis added)

1st step. Within five (5) working days after a grievance arises the employee (with or without his Shop Steward as he may choose) shall discuss the matter with his immediate supervisor who shall reach a decision within the next two (2) working days, unless an extension is mutually agreed upon in writing.

2nd step. In the event a satisfactory settlement has not been reached or decision made, within the time specified in the 1st step, the employee (with his Shop Steward or Business Representative) shall take up his grievance within two (2) additional working days with his department head. The department head shall reach a decision within the next three (3) working days, unless an extension is mutually agreed upon in writing.

3rd step. In the event a satisfactory settlement has not been reached or decision made by the department head, within the time specified in the 2nd step, the employee (with Shop Steward or Business Representative) shall within two (2) additional working days present his grievance direct to the President who will review the case with a view of arriving at a mutually satisfactory settlement. If no mutually satisfactory settlement can be arrived at within five (5) working days, the matter may be referred by either party to arbitration as hereinafter provided.

In an emergency, Step #1 may be taken up during regular working hours and time thus lost by the employee and his Shop Steward will be borne by his Company unless, in its opinion, such lost time becomes unreasonable. Otherwise, all grievances will be considered and acted upon outside of regular working hours and no time thus spent by the employee and/or his Shop Steward will be borne by his Company.

If a discharged employee claims he has been discharged without just cause, his case will be handled through the grievance procedure described above. Should such an employee be reinstated due to a decision that he was discharged without just cause, he shall be compensated for the time lost not to exceed (8) hours per day or forty (40) hours per week at his straight time hourly rate.

Any grievance which is not presented or processed within the time limits set forth in this section, shall be deemed to have been settled to the mutual satisfaction of the aggrieved employee and his Company."

ARBITRATION PROVISIONS

Article XII of the Agreement reads as follows:

"ARBITRATION

Any grievance arising out of a difference or dispute as to the interpretation or application of any provision of this Agreement which has not been satisfactorily settled through the grievance procedure prescribed herein, shall be referred to a Board of Arbitration consisting of three (3) men....(Exhibit 1, page 22)

. . .

Millar presently has a contract with the Plaza Hotel (Tr. 5) to upgrade, modernize, install and replace existing

elevators to improved automatic operation (Tr. 5) The work was and is being performed by Millar's employees covered by the Collective Bargaining Agreement between it and Local 3 (Tr.7) and is work that Millar's Local 3 employees have performed many times before. (Tr.6) This work is being performed on cars, 5, 6, 7 and 8 at the Plaza Hotel. (Tr. 6)

Millar's President, Yale Citrin, was informed by James O'Hara, the Business Representative of Local 3, that the members of his Union would no longer perform any work on elevator numbers 5, 6, 7 and 8 at the Plaza Hotel and that he was instructing Millar's employees that they were to stop work. (Tr. 8)

Citrin told O'Hara that wasn't right or fair to do in the middle of a major job and that his Union was under contract to Millar. (Tr.8).

Millar's employees on the Plaza Hotel job were notifed by defendant, O'Hara that they were to stop work on elevators 5, 6, 7 and 8. (Tr.9)

On August 2, 1976, Cirtin sent the following mailgram to Mr. Thomas Van Arsdale, of Local 3: (Tr. 11)

"We have been informed that members of your Union employed by our Company have been instructed by the Union to no longer perform work on elevators number 5, 6, 7 and 8 at the Plaza Hotel. We consider this work stoppage in violation of the no-strike provision of our agreement. Your claim that this work is not within the scope of work covered by our agreement is a matter subject to arbitration. We demand that you immediately rescind any and all instructions to your members to cease this work and further demand that you submit this matter to arbitration. We stand ready to select a Board of Arbitration."

No response was received from Local 3 to this mailgram. (Tr. 10)

CONTRACT VIOLATIONS BY LOCAL 3

On August 4, 1976 at approximately 3 P.M. the members of Local 3, employed by Millar at the Plaza Hotel project ceased all work on elevators 5, 6, 7 and 8. There were conversations with the men but they refused to work. (Tr. 9)

No further work was performed on elevators 5, 6, 7 and 8 until August 10, 1976 when in the face of being punished by Judge Weinstein for contempt of Judge Pratt's order of August 5th, the employees returned to that work.

The Agreement between Local 3 and Millar contains an exhibit marked A, Job Classification Descriptions. The description of a "Grade A Elevator Repair Mechanic" specifies that he is to "Repair, modernize and install elevators".

As a result of Local 3's refusal to perform this work at the Plaza, Millar may default under its contract. The damages Millar would be l[illegible]ble for are incalculable and Millar would lose its reputation as a reputable elevator company. Local 3's actions will subject Millar to a liability which cannot be fully estimated, calculated or compensated in money. (Tr. 13)

Summary of Argument

Point I

THE DISTRICT COURT'S INTERPRETATION OF THE INSTANT ARBITRATION LANGUAGE REQUIRING THAT AN EMPLOYEE INITIATED GRIEVANCE BE THE PREDICATE FOR THE EXISTENCE OF AN ARBITRABLE DISPUTE WITHOUT WHICH NO INJUNCTION IS WARRANTED, IS AN INACCURATE STATEMENT OF THE LAW.

While Judge Weinstein did not write an opinion to support his order, the grounds for his ruling are contained in the transcript of the proceedings before him on August 12, 1976. After examining the arbitration and grievance clauses contained in the Local 3 - Millar Agreement, Judge Weinstein concluded:

> "11 is the grievance procedure. Article 11 clearly relates to grievances of employees. It provides a detailed way of resolving grievances of employees.
>
> Article 11 is not applicable here because the employees have no grievances. They are not complaining about anything.

> Article 12 is the basic arbitration provision. It provides, 'Any grievance arising out of a difficulty or dispute as to the interpretation or application of any provision of this agreement,' here I emphasize 'which has not been satisfactorily settled through the grievance procedure described herein and goes on shall be subject to arbitration.'
>
> This is not a grievance procedure provided herein. It is an entirely different kind of dispute.
>
> Article 15 is dealing with the strikes and lockouts provided in Subdivision B, 'Any violation on the part of the union official constitutes a breach of this agreement.' This may be a breach, but we have here in the agreement, 'on the part of any employee shall constitute cause for disciplinary action which may include discharge.'
>
> As I read this agreement, this is not an arbitrable dispute."

This very issue was addressed by the 3rd Circuit in Avco Corp. v. Local 787, UAW, 459 F.2d 968 (3rd Cir., 1972).

In that case, as here, the lower court maintained that the Company and the Union were not contractually bound to arbitrate since the grievance procedure was "employee oriented" and the Company had no right to initiate such a procedure.[1] The Circuit Court in rejecting that argument held that such an interpretation of the limitation of the Boys Markets Rule was far too restrictive.

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(1) Footnotes appear as an appendix to this brief.

The facts in Avco were that Avco and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local No. 787 (jointly referred to as the Union) entered into a collective bargaining agreement which contained, inter alia, a "no-strike" clause and a broad compulsory arbitration clause. In essence, the compulsory arbitration clause provided (1) that a grievance is "defined as any alleged violation of the terms of this Agreement or differences of opinion as to its interpretation or application", (2) that "any individual employee or group of employees shall have the right to present grievances to the Company at any time", (3) that in the event grievances are unresolved by resort to the mechanisms set forth in the agreement, the Union may refer the matter to the American Aribtration Association, and (4) that "[t]he decision of the arbitrator shall be final and binding upon the parties". Avco had laid 1500 employees because of adverse ecomonic conditions in the aerospace industry, but despite the layoffs, the nature of the products manufactured required overtime work. The Union passed a resolution to the effect that the members would refuse overtime work until such time as the laid-off employees were rehired. Avco was notified of the resolution, and when the employees refused to accept further overtime, Avco sought an injunction in the state courts. The cause was removed by the Union to the district court which, after a hearing, denied the injunctive relief,

holding that Avco and the Union "are not contractually bound to arbitrate the present dispute *** since the procedure *** was employee-oriented and since only the union had the right to institute action under the provisions of the agreement." 325 F.Supp. at 591.

The Third Circuit Court reversed holding:

> "We believe that this interpretation of the limitations of Boys Markets is far too restrictive. All that Boys Markets requires is that 'both parties are contractually bound to arbitrate.' 398 U.S. at 254, quoting 370 U.S. at 228. It does not require that both parties be capable of initiating arbitration."

There are patent similarities between Avco and the instant matter. The Grievance and Arbitration clauses are similar if not almost identical. The fact pattern of the Union coming to a unilateral conclusion and enforcing that conclusion by a work refusal is also similar.

The facts and contract language are so similar that we submit that the instant matter is on "all focus" with Avco.

The "procedure" referred to in the instant Agreement is entitled "GRIEVANCE PROCEDURE". The term "grievance" is not defined by the Agreement. Nor are the terms "difference" and "dispute". Yet, it is the "difference" and "dispute" which must be submitted to the "GRIEVANCE PROCEDURE", and it is:

> "Any grievance arising out of a difference or dispute ... which has not been satisfactorily settled through the grievance procedure prescribed herein, (which) shall be referred to a Board of Arbitration ...."

If the Court limits its perspective, it will view "grievance", "difference" and "dispute" as mutually exclusive disparate terms which narrowly define particular relations between the employer and its employees. If we use common sense, we will view these words as supportive terms used to denote a broadly defined relation between the employer and its employees.

What is a "grievance"? In the absence of contractual definition it has been said that:

> "(t)he term connotes conflict and irritation, and thus could be defined as any 'gripe' or any type of complaint by an employee or a union against the employer or by an employer against his employee or the Union." Elkouri, How Arbitration Works, Third Ed. 1973, The Bureau of National Affairs, Inc. p. 109 (hereafter "Arbitration").

Does not a "difference" or "dispute" connote a "conflict", "gripe", "irritation" or "any type of complaint"?

Here we had a work stoppage; in Avco there was a refusal to work overtime. Can we believe that employees and their Union effect a stoppage and strike in the absence

of a "difference" or "dispute" or "gripe" or "irritation" or "conflict"?

We respectfully submit that Judge Weinstein's order ignores the established holding of the Supreme Court in Boys Markets, Inc. v. Retail Clerks, 398 US 235 (1970) and the Third Circuit in Avco, supra. This Court has not enunciated a contrary rule to the Avco holding to our knowledge and we urge that it follow the decision of the Third Circuit.

The Avco decision has been cited with approval by the Fourth Circuit in Monongahela Power Co. v. Local No. 2332, International Brotherhood of Electrical Workers, 484 F.2d 1209 (4th Cir., 1973). There the Court states:

> "...it is immaterial to the Company's duty to arbitrate that the grievance procedure is employee oriented. The Company is bound to arbitrate if the Local elects to pursue that remedy, and the Local is bound to arbitrate a grievance rather than to resort to a work stoppage. Avco, supra 459 F.2d at 972. The claimed violation of the bargaining agreement is, therefore, "a grievance which both parties are contractually bound to arbitrate."

The Court of Appeals for the Seventh Circuit reversed and remanded a decision by the District Court for the Northern District of Illinois. The District Court had denied an

injunction sought by an employer to enjoin a strike on the ground that the contractual grievance - arbitration procedures permitted reference of a dispute to an arbitrator only after failure to resolve a grievance filed by an "aggrieved employee." See, Kable Printing v. Dist. Lodge, No. 101, International Assn. of Machinists & Aerospace Workers, 498 F.2d 1403, (7th Cir. 1974) reversing and remanding, 359 F.Supp. 265 (No.D., Ill. 1973).

In Teledyne Wisc. Motor v. Local 283, United Automobile Workers, 530 F.2d 727, (7th Cir. 1976), the Seventh Circuit Court of Appeals in affirming the District Court's denial of an injunction sought by an employer to restrain employee refusal to work overtime on the ground that there was no express "no strike" clause in the contract expressly preserves its approval of the Third Circuit's holding in Avco, supra, by distinguishing Avco on the ground that the agreement before them did not contain a "no-strike" clause and the union is consequently not precluded--contrary to the situation in Avco--from engaging in a strike, work stoppage, refusal to work overtime, or other type of production shut-down or slowdown. Thus the "quid pro quo" present in Avco was lacking.

In the case sub judice the existence of a no-strike clause is not in dispute. Even if the instant arbitration clause is employee oriented it is the quid pro quo for a broad "no strike" clause, thus clearly within all four corners of the Avco holding.

Appellant contends that their dispute is arguably subject to arbitration and that since the arbitration clause makes all grievances arising out of the interpretation or application of the agreement subject to arbitration, the failure of the Union or an employee to file a grievance regarding the dispute, which would be processed, would invalidate the arbitration procedure which is encouraged by federal policy.

The Supreme Court in Boys Markets, Inc. v. Retail Clerks Union, supra, in directing that the Union's strike be enjoined, specifically applied its holding to a situation in which "a collective bargaining contract contained a mandatory grievance provision" which was similar to the instant clause.[2] 398 U.S. at 253-4 In fact the Arbitration Clause in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) is also similar to the one at bar.[3] It should be noted that Justice Brennan in writing the dissent in Sinclair set out the guidelines for what was to become the criteria for the issuance of an injunction in Boys Markets and its progeny.

In Gateway Coal v. United Mine Workers, 414 U.S. 362 (1974) the Supreme Court, applying the Boys Markets Rule, held that an injunction may issue to protect the arbitration process even if a "substantial question of contractual interpretation must be answered to determine if the strike is over an arbitrable grievance". 414 U.S. at 382. In Gateway, employees refused to perform work they believed unsafe, true the employees are refusing to perform work on the tenuous belief that it is no longer "their work".

We submit that the District Court is in error by having dismissed the Complaint and having refused plaintiff's provisional remedies as a matter of law.

POINT II

THE RESOLUTION OF JURISDICTION AND DISPUTES BETWEEN LOCAL 1 and LOCAL 3 DOES NOT AFFECT LOCAL 3'S OBLIGATIONS UNDER ITS AGREEMENT WITH MILLAR

In so-called "jurisdictional" or "representational" disputes the Supreme Court has held that resort to arbitration may abe a pervasive, curative effect, even though one Union is not a party. By allowing such disputes to go to arbitration, fragmentation of disputes is substantially avoided;

and those conciliatory measures which Congress deemed vital to "industrial peace" and which may be dispositive of the entire dispute are encourage, notwithstanding that the NLRB may also at some time have jurisdiction over the same dispute in whole or in part. Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964).

We do not actually have a jurisdictional dispute in the instant matter since Millar recognizes only one Union, Local 3, as the representative of all of its employees. It has no employees represented by Local 1 which claims the work in question. Compare, Morning Telegraph v. Powers, 450 F.2d 97 (2nd Cir. 1971), in which the arbitration agreement expressly excluded from arbitration matters involving jurisdiction or work assignment.

Judge Weinstein below seems to imply in his remarks that because there had been a jurisdictional dispute between Local 1 and Local 3, the dispute between Local 3 and Millar is not subject to arbitration. He suggests that the parties should seek relief exclusively from the National Labor Relations Board [Tr. 28-30]. We respectfully submit that Judge Weinstein's view is totally contrary to the holdings enunciated in both Carey v. Westinghouse and Morning Telegraph v. Powers, supra.

The Union here places great reliance on the case of Drywall Tapers and Pointers, Local 1974 v. Plasterers, Local 60, __F.2d__, 92 LRRM 3202 (2d Cir. 1976) affirming __F.Supp. 2d____, 92 LRRM 2831 (S.D.N.Y. 1975). That case is totally inapposite to the legal and factual matrix at bar. It involved the enforcement of an agreement to arbitrate a jurisdictional matter between two Unions; not a Union and an employer. It says nothing which would justify a Union's unilateral refusal to perform work under its contract with an employer in violation of a "no-strike" clause as a result of its jurisdictional arbitration with another Union.

The recent decision of the United States Supreme Court in Buffalo Forge Company v. United Steelworkers of America, AFL-CIO, __US__, 92 LRRM 3032 (July 6, 1976) is not applicable to this case.

As was stated by Judge Smith of this Court, the issue in Buffalo Forge was a very narrow and limited one, to wit:

> "If a union enters into a collective bargaining agreement establishing a mandatory arbitration procedure and including a no-strike clause and then later strikes solely out of deference to another union's lawful picket line at a place of employment common to the two unions, does a federal district court have authority under §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), to enjoin the strike or is it precluded from granting injunctive relief by §4 of the Norris-LaGuardia Act of 1932, 29 U.S.C. §104" 517 F.2d 1207. (2nd Cir.)

We submit that the holding of the Buffalo Forge case is that Federal Courts will not enjoin a strike where by doing so it would resolve the very dispute which the employer seeks to have resolved in arbitration.

In the case at hand, as was true in Boys Markets itself, the underlying dispute causing the stoppage is the union's attempt to force the company to accede to its demand regarding the assignment and performance of certain job duties.

In Boys Markets, the dispute between the employer and the Union was whether the scope of work covered by the collective agreement covered work which the employer had assigned to supervisors. Here the dispute between the employer and the Union is whether the scope of work covered by the collective agreement covers work which the employer has assigned employees represented by Local 3. (These employees have been performing this work for the past 20 years).

Rather than arbitrate this difference as to the interpretation and application of its agreement with Millar, the Union has chosen to order a work stoppage in violation of its no-strike pledge.

In Buffalo Forge, on the other hand, the court determined it will not enjoin a strike over the scope of the no-strike clause itself, since by doing so the court would

in all practicality be settling the dispute prior to arbitration.

In both Boys Markets and the instant matter, the issue in dispute is the employer's interpretation of the scope of work covered by the Agreement.

The underlying dispute regarding the interpretation of assignment of work will not be resolved by the injunction ordering Millar's employees to continue the work while the arbitrator decides this dispute. As was true in Boys Market, an injunction pending arbitration is essential to carry out the promise to arbitrate.

POINT III

MILLAR WILL SUFFER IRREPARABLE HARM UNLESS LOCAL 3 IS ENJOINED

Contrary to Judge Weinstein's suggestion that Millar sue Local 3 for violation of the collective bargaining agreement, (Tr. 30), the Supreme Court, in Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235 at 248, expressly points out that a suit for damages rather than an injunction ordering arbitration "might not repair the harm done by the strike and might exacerbate labor management strife".

The overwhelming deference to arbitration enunciated in the Steelworkers Trilogy was for the express purpose of best ensuring industrial peace. The Court suit suggested by Judge Weinstein is the very evil, protracted litigation, that the Supreme Court sought to avoid by making parties adjudicate labor dispute through the "short hand" of arbitration.

Further, the clear weight of evidence establishes that Millar is entitled to injunctive relief under the ordinary rules of equity. It is plain that the Union will, unless enjoined, continue to strike in violation of its contractual obligations. Similarly, the record shows that Millar is suffering irreparable harm as a result of the strike by its inability to perform its contract with the Plaza Hotel, and thus suffer injury to its good name and reputation. The denial of injunctive relief to Millar will result in much greater harm to it than the potential injury which the Union might suffer if this relief is granted.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed with an order (1) directing that the

complaint be reinstated (2) that the relief requested in the complaint be granted.

Respectfully submitted,

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FOOTNOTES

1. The following is a copy of the Grievance Procedure contained in the agreement to arbitrate, set forth in the District Court decision in Avco Corp. v. Local 787 United Auto Workers, 325 F.Supp. 588 (1971).

ARTICLE III
GRIEVANCE PROCEDURE

Section 1. Grievances are defined as any alleged violation of the terms of this Agreement or differences of opinion as to its interpretation or application. Subject to the provisions of Section 7 of this Article III, grievances as defined herein, shall be settled promptly in the manner hereinafter set forth.

Step 1. A grievance, except one which is of a general or policy nature, must first be taken up orally with the Department Foreman by the Department Steward and the employee asserting the grievance. However, any individual employee or group of employees shall have the right to present grievances to the Company at any time. In the event of a settlement, a Union representative shall have the right to be present.

Step 2. If no satisfactory settlement of the grievance is reached in Step 1, the Steward will reduce it to writing in duplicate on a grievance form provided by the Company, and present it to the Department Foreman. No later than two working days following that on which the grievance was presented to the foreman, a meeting shall be held for the purpose of a full investigation of all facts concerned with the grievance. Those present at this meeting may include the Labor Relations Manager (or his designated representative), the Department Head, the foreman, the aggrieved employee or employees, the area Steward, the Shop Chairman (or his designated representative), the area Committeeman, and any such other individual or individuals who have knowledge or information which would be pertinent to the discussion and settlement of the grievance. Within two working days following the conclusion of this meeting, the Department Head will answer the grievance and return it to the area Committeeman. Failure to answer the grievance within the time limitation specified will automatically advance it to the next step.

Step 3. If no satisfactory settlement of the grievance is reached in Step 2 above, the grievance shall be presented by the Shop Committee to the Labor Relations Manager or his designated representative. The Labor Relations Manager or his designated representative shall meet with the Shop Committee once weekly at a designated time for the purpose of settling any grievances that may be referred to this step. The International Representative of the Union may participate in these meetings. The Labor Relations Manager or his designated representative shall give a written disposition to all grievances presented at this meeting within five (5) working days after this meeting. Failure to do so will automatically move the grievance to the next step.

Step 4. In the event any grievance referred to the Third Step meeting of the grievance procedure as provided herein, remains unsettled following discussion of the grievance in that meeting, it may be formally referred, in writing, by the Union to the American Arbitration Association for the purpose of arbitrating the unsettled matter. In order to be valid, such formal written notification to the American Arbitration Association must be made within twenty-one (21) calendar days from the date a written answer is given following the third step grievance meeting and a copy of such notification shall be sent to the Company. In the event such formal referral is not made within this twenty-one (21) calendar day limit, the grievance shall be considered settled on the basis of the last decision and not subject to further appeal. A grievance properly submitted to the American Arbitration Association shall be considered by an arbitrator who shall be selected, and arbitration shal proceed, under the Voluntary Labor Arbitration Rules then obtaining of the American Arbitration Association.

However, if the American Arbitration Association is unable to appoint the arbitrator on the basis of the preference of the parties as indicated on the first list of arbitrators submitted to the parties in accordance with its Rules, a second list of three (3) arbitrators, none of whom shall have appeared on the first list, shall be submitted to the parties for their consideration. The Company and the Union may strike one name from the second list. In the event either party fails to return the second list in the prescribed manner and time the American Arbitration Association may appoint the arbitrator from the list of the complying party.

The Arbitrator when duly appointed, shall proceed to consider the disputed grievance without delay, and shall render his decision promptly following the conclusion of his taking evidence in the matter. The decision of the arbitrator shall be final and binding upon the parties. The jurisdiction of the arbitrator shall be limited to determining questions involving the interpretation or application of the terms of this Agreement, or any agreement made supplementary hereto. He shall have no authority to add to or subtract from, or to change, any of the terms of this Agreement, including the existing wage rates, as set forth in Exhibit "A", "B", and "C", production standards, job classifications, or operations, nor shall more than one (1) grievance be arbitrated by any one arbitrator. The cost of the expense of the American Arbitration Association proceedings, including the compensation paid the arbitrator, shall be borne by the party losing the case. If the decision is not clear cut as to which party won or lost said case, the arbitrator shall decide which party shall be assessed the cost.

2. The following is the Greivance and Arbitration Clause considered in Boy's Markets v. Retail Clerks Union, 398 U.S. 235, found in decision of District Court, 70 LRRM 3071.

"ARTICLE XIV
"ADJUSTMENT & ARBITRATION

"A. Controversy, Dispute or Disagreement

Any and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement, except as may be otherwise provided in Paragraph D of this Article, shall be settled and resolved by the procedures and in the manner hereinafter set forth.

"B. Adjustment Procedure.

"1. *Store Level.* The Union through its representatives shall attempt to settle or resolve any such matter with the appropriate store supervisor or person designated by the Employer in the manner indicated in Article X of this Agreement.

"2. *Meeting of Representatives.* Upon receipt of a written notice from either party, the representatives of the Employer and the representatives of the Union shall meet within a calendar week and attempt to settle or resolve the matter.

"3. *Food Employers Council, Inc.* The Union hereby recognizes the Food Employers Council, Inc. as the authorized representative of its members in matters pertaining to the negotiation and administration of this Agreement. In the event of a dispute, it shall be the duty of the Employer to notify the Food Employers Council, Inc. of the existing dispute if said Employer desires said Food Employers Council, Inc. to represent it in the dispute. Should a grievance or dispute be settled between the Union and any Employer signatory to this Agreement without the participation of the Food Employers Council, Inc. and if in such settlement, an interpretation of any language or phrase of this Agreement is involved in order that such settlement be reached, the Union shall, within ten (10) days of such settlement notify Food Employers Council, Inc., in writing of the dispute, the language or the phrase interpreted, the settlement reached, and the date of such settlement. Should the Union fail to notify the Food Employers Council, Inc., as set forth above, the fact of settlement and the interpretation of the language or phrase of the Agreement involved in the settlement shall not be used in evidence for any purpose whatsoever. No such settlement or interpretation shall be binding upon the Food Employers Council, Inc. or its members unless the Council or its members thereof participated in arriving at such settlement or interpretation.

"C. Arbitration.

"1. Any matter not satisfactorily settled or resolved in Paragraph B hereinabove shall be submitted to arbitration for final determination upon written demand of either party. The written demand for arbitration may be made at any time after the expiration of fifteen (15) days from the date of the notice submitting the matter under Paragraph B, subsection 2, hereinabove, to the meeting of representatives.

"2. The representatives of the Union and the representatives of the Employer shall meet for the purpose of selecting an impartial arbitrator within the ten (10) day period following the demand for arbitration. If no agreement upon an arbitrator is reached during this period, either party may then request a list of fifteen (15) persons qualified to act as arbitrators under this Agreement from the Federal Mediation and Conciliation Service and upon receipt of this list the parties shall immediately thereafter select the arbitrator by alternately striking names from the list until the last name remains. The parties shall draw lots to determine who shall make the first deletion from the list.

"3. Should either party desire, a board of arbitration shall be convened in lieu of a single arbitrator, consisting of an equal number of arbitrators appointed by each party (not to exceed two appointed by each) and the impartial arbitrator who shall be chairman. The board shall hear and determine the matter by majority vote of the members of the board.

"4. The arbitrator or board of arbitration shall be empowered to hear and determine the matter in question and the determination shall be final and binding upon the parties, subject only to their rights under law. The hearings shall be held within thirty (30) days after the selection of the arbitrator, or board, which shall have the power to decide the date or dates upon which the arbitration is to be held if agreement cannot be reached by the parties.

3. The following is the Grievance and Arbitration Provisions considered in Sinclair Refining Co. v. Atkinson, 370 U.S. 195, found in Appendix to Atkinson v. Sinclair Refining Co., 370 U.S. 238.

Article 26 provides:

"GRIEVANCE AND ARBITRATION PROCEDURE

"Definition

"1. A grievance is defined to be any difference regarding wages, hours or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operations.

"Grievance Procedure

"It is the sincere desire of both parties that employees grievances be settled as fairly and as quickly as possible. Therefore, when a grievance arises, the following procedure must be followed:

"2. For the purpose of adjusting employee grievances and disputes as defined above, it is agreed that any employee, individually or accompanied by his committeeman, if desired shall:

"(a) Seek direct adjustment of any grievance or dispute with the foreman under whom he is employed. Such meeting will be without loss of time to the employee and/or his committeeman during regular working hours for time spent in conference with the foreman. The foreman shall reply to said employee within three (3) working days (Saturday, Sunday and Holidays excluded) from the date on which the grievance was first presented to him;

"(b) If the question is not then settled, the employee may submit his grievance in writing, on forms supplied by Union, to a committee selected as hereinafter provided for the particular plant or region in which such employee is employed. Such committee shall investigate said complaint and if in its opinion the grievance has merit, it shall have the right to meet with the local company superintendent or his representative, who shall receive the committee for this purpose. Written decisions shall be made by the local superintendent or his representative within ten (10) days after meeting with the committee, provided that prior to the time of or at the meeting with the committee such complaint or grievance has been submitted in writing to the local superintendent or his representative.

"(c) In exceptional cases, Workmen's Committees shall have the right to institute grievances concerning any alleged violation of this Agreement by filing written complaint with the official locally in charge.

"(d) Any grievance filed with or by the local Workmen's Committee can only be withdrawn with the Workmen's Committee's consent.

"3. No complaint or grievance shall be considered hereunder unless it is presented to the superintendent or official locally in charge within sixty (60) days from the date on which the complaint or grievance arose, or from the date on which the employee or employees concerned first learned of the cause of complaint.

"4. The committee above mentioned shall be selected from among and by employees of the Employer who are members of the Union. No official, foreman, or employee having authority to hire or discharge men shall serve on the committee.

"5. In case of discharge or lay-off, employees who may desire to file complaints must present such complaints within one (1) week after the effective date of discharge or lay-off to the committee mentioned in this Article. Before any such employee is to be discharged for cause, other than flagrant violation of rules, or is to be laid off, he shall be given a written notice, dated and signed by his foreman or other representative of the Employer, setting forth the reason for such discharge or lay-off. In the event an employee has been discharged for a flagrant violation of a company rule, he shall subsequently, upon request, be given a written notice, dated and signed by his foreman or other representative of the Employer setting forth the reason for such discharge. The Workmen's Committee will be furnished with a copy of the statement furnished to the employee, both where the discharge or lay-off is for cause or for flagrant violation of a Company rule. Any grievance to be filed under this section must be filed within forty (40) days from the effective date of the discharge or lay-off.

"6. In the event the decision of the superintendent or his representative shall not be satisfactory to the committee, it is agreed that the President of the Oil, Chemical and Atomic Workers International Union, AFL-CIO, or someone designated by him, shall, not later than forty-five (45) days after such decision, have the right to confer with the Director of Industrial Relations for the Sinclair Companies, or someone designated by him, for the purpose of discussing grievances or disputes and of obtaining decisions thereon. It is agreed that the Director of Industrial Relations for the Sinclair Companies, or someone designated by him, shall render a decision to the President of the Oil, Chemical and Atomic Workers International Union, AFL-CIO, within twenty (20) days after grievances or disputes have been so submitted to him in writing.

continued

"7. If such decision is not satisfactory, then, upon request of the President or any District Director of the Oil, Chemical and Atomic Workers International Union, AFL-CIO and within sixty (60) days from the posting date of the final appeal answer, there shall be set up a local Arbitration Board, and such grievances and disputes submitted to it within ten (10) days after formation of such Board. Such local boards may be set up at each refinery to deal with cases arising therefrom; cases arising from Sinclair Oil & Gas Company shall be heard and determined at Tulsa, Oklahoma; Fort Worth, Texas; Midland, Texas; or Casper, Wyoming; cases arising from Sinclair Pipe Line Company shall be heard and determined at the cities previously named or at Kansas City, Missouri; Toledo, Ohio; Houston, Texas; Chicago, Illinois; Philadelphia, Pennsylvania; or Independence, Kansas. These local Arbitration Boards shall consider only individual or local employee or local committee grievances arising under the application of the currently existing agreement, or supplements thereto, and local wage and classification disputes submitted on the initiative of the President or any District Director of the Oil, Chemical and Atomic Workers International Union, AFL-CIO. In this connection, Employer agrees to give consideration to local classification rate inequity complaints existing by reason of a comparison with the average of competitive rates of pay for like jobs having comparable duties and responsibilities being paid by agreed-upon major competitive companies in the local area. Such requests for adjustments of classification rate inequities, if any, shall be made not more frequently than twice annually, to be effective on February 1st and August 1st. Such requests to be submitted at least thirty (30) days prior to such semi-annual dates.

"8. The above mentioned local Arbitration Board shall be composed of one person designated by Employer and one designated by the President or District Director of the Oil, Chemical and Atomic Workers International Union, AFL-CIO. The board shall be requested by both parties to render a decision within seven (7) days from date of submission. Should the two members of the board selected as above provided, be unable to agree within seven (7) days, or to mutually agree upon an impartial third arbitrator, an impartial third member shall be selected within seven (7) days thereafter by the employer or employee member of the Arbitration Board, or such two parties jointly, requesting the Federal Mediation and Conciliation Service to submit a panel of arbitrators from which the third member of the board will be selected in accordance with the procedure of such Federal Mediation and Conciliation Service.

"9. The decision of the Board aforesaid, as provided in Section 8 hereof, shall be final. However, if the rules and conditions existing at the time a given case originated are subsequently changed, it is understood that the arbitration award rendered under former rules and conditions shall not act to prohibit consideration of a complaint originating under the changed rules and conditions.

"10. Cases arising from the Gasoline Plants shall be considered as coming within the Producing Division in which they are located.

"11. The fee and expense of the impartial arbitrator selected as above provided shall be divided equally between the parties to such arbitration. The Parties agree to attempt to hold the arbitrator's fees to a reasonable basis."

(1) Service of two (2) copies of

the within Brief is hereby admitted this

19th day of August, 1976

Attorney for

(2) Service of two (2) copies of

the within Brief is hereby admitted this

19th day of August, 1976

Attorney for